United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1203

To be argued by
JOSEPH JAFFE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1203

UNITED STATES OF AMERICA,
Appellee,

—v.—

PETER DALY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Peter Daly appeals from a judgment of conviction entered on August 22, 1975 in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.*

Indictment 74 Cr. 229, filed on March 8, 1974, charged Peter Daly and Joseph Novoa in Count One with con-

* Daly's notice of appeal from the judgment of conviction was filed by his trial counsel, Victor Herwitz, Esq., on August 22, 1975, the date of Daly's sentencing. Thereafter, Daly failed to take the steps required to perfect his appeal in a timely fashion. Accordingly, on April 14, 1976, this Court dismissed Daly's appeal for lack of prosecution. On April 28, on motion of Daly's present counsel, Ira Leitel, Esq., that dismissal was vacated and the appeal was reinstated.

spiracy (1) to defraud the United States by obstructing and hindering federal law enforcement agencies in the investigation and prosecution of violations of the federal narcotics laws; (2) to violate Title 21, United States Code, Sections 173 and 174; (3) to violate Title 18, United States Code, Section 3; and (4) to violate Title 18, United States Code, Section 1510, all in violation of Title 18, United States Code, Section 371. Count Two charged Daly and Novoa with having deliberately withheld cash and narcotics which constituted evidence of narcotics violations, thereby hindering the trial and punishment of the narcotics violators, in violation of Title 21, United States Code, Sections 173 and 174 and Title 18, United States Code, Section 3. Count Three charged Daly and Novoa with having obstructed, by means of bribery, misrepresentations, and threats, the communication of evidence of violations of the narcotics law, in violation of Title 18, United States Code, Sections 1510 and 2. Count Four charged Daly, Novoa, Frank Ramos, Demetrios Papadakis, a k a "Jimmy Pappas", a k a "Jimmy the Greek", Joaquin Nieves and Elissa Possas with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Sections 173 and 174. Count Five charged Daly and Novoa with receiving five kilograms of heroin and cocaine on April 15, 1970, in violation of Title 21, United States Code, Sections 173 and 174. Counts Six and Seven charged Daly, Novoa, Ramos, Papadakis and Possas with the purchase and sale of one kilogram of heroin on two occasions in May or June, 1970, in violation of Title 21, United States Code, Sections 173 and 174. Count Eight charged Daly, Novoa, Ramos and Nieves with the purchase and sale of one kilogram of heroin in May or June, 1970, in violation of Title 21, United States Code, Sections 173 and 174. Counts Nine and Ten charged Daly, Novoa and Ramos with the purchase and sale of one kilogram of cocaine on two occasions in May or June, 1970, in vio-

lation of Title 21, United States Code, Sections 173 and 174.

When trial commenced on May 15, 1974 as to Novoa, Papadakis and Nieves, Daly was a fugitive.* That trial resulted in the convictions of Novoa on Counts One and Four through Ten and of Papadakis on Count Seven, which convictions were affirmed by this Court. *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Nieves was acquitted on Count Eight, the sole count submitted to the jury as against him. Ramos entered a guilty plea on May 15, 1974 to a superseding information charging him with conspiracy to purchase and sell narcotic drugs not in or from the original stamped package, in violation of Title 26, United States Code, Section 4704(a).

On June 14, 1974, Judge Wyatt sentenced Papadakis to a term of five years' imprisonment on Count Seven to run concurrently with consecutive five year terms he was then serving for prior violations of the federal narcotics laws. On July 2, 1974, Judge Wyatt sentenced Novoa to a term of five years' imprisonment on Count One to run concurrently with concurrent terms of ten years' imprisonment on Counts Four through Ten.

In December 1974, Daly was arrested in England and extradited on Counts Four, Five, Six and Seven. Daly was brought to the Southern District of New York on May 13, 1975 and remanded in lieu of posting $100,000 bail.

Daly's trial commenced on June 2, 1975, and on June 9th, the jury, after deliberating for less than two hours,

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* Possas was also a fugitive at that time and remains so to date.

returned a verdict of guilty on all four counts. On August 22, 1975, Judge Wyatt sentenced Daly to terms of ten years' imprisonment on each of the four counts, to run concurrently with each other.

Daly is presently serving his sentence.*

Statement of Facts

The Government's Case

A. Introduction.

The investigation and prosecution of this case exposed a sordid venture into criminal activity and corruption by three New York City detectives, Daly, Novoa and Carl Aguiluz, who comprised one of the teams within the elite Special Investigations Unit ("SIU") of the Narcotics Bureau of the New York City Police Department, which was charged with the responsibility for investigating "major narcotics pushers" in the City. The evidence adduced at trial conclusively showed that the Daly-Novoa-Aguiluz team itself qualified for "major narcotics pusher" status in that, among other things, they stole five kilograms of narcotics seized as evidence from arrested narcotics dealers in the famous "100 kilo" case and, at Daly's suggestion, later sold the narcotics, through an intermediary, on the streets of New York.

B. The arrests in the "100 kilo" case.

On April 14, 1970, Daly, Novoa and Aguiluz, while conducting surveillance in the vicinity of Seventh Avenue

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* On January 30, 1976, Judge Wyatt denied a motion to reduce Daly's sentence.

and 14th Street in Manhattan, observed a white Ford automobile bearing Florida license plates proceeding south on Seventh Avenue. Inside the car were four individuals later identified as Emilio Diaz Gonzalez, a k a "Alfred Picardo", Jose Luis Mulas, Jorge Rodriguez Arraya and Elena Risso, a k a "Yolando Sarmiento." Two of these individuals left their car in front of the Cafe Oveido on 14th Street and knocked on the window of that restaurant. A woman who emerged from the cafe briefly engaged them in conversation. Shortly thereafter, the woman re-entered the restaurant, and the two individuals returned to their car. The three detectives then followed the suspects in their white Ford —Daly in his car; Aguiluz and Novoa in their own, but at all times in radio contact with Daly—as they proceeded first to a delicatessen in the area of Sheridan Square and then north on the West Side Highway and over the George Washington Bridge to the area of Englewood, New Jersey. (Tr. 77-83, 85).*

It soon became apparent that the suspects realized they were being followed. Then, within minutes, the suspects and the detectives were stopped by local police officers. Aguiluz identified himself to the local officers as a narcotics officer and stated that he wanted to talk to the four suspects. The three detectives then sought to make an identification of the four suspects and conducted a search of the trunk of their car. Thereafter, Novoa and Aguiluz drove back to New York with the suspects in the white Ford; Daly followed them in his own vehicle. (Tr. 83-87).

During the return trip, the suspects became indignant, claimed they were legitimate people with "roots in the community" and said they would show the detectives where they lived. The two cars exited the West Side Highway at 18th Street, and Gonzalez began to

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* "Tr." refers to the Trial Transcript.

point out various buildings where he claimed to have an apartment. After some futile efforts to find any such apartment, Novoa and Aguiluz decided to stop and conduct a second identification check of Gonzalez and a complete search of the suspects' car. Gonzalez produced a portfolio containing three passports, each bearing Gonzalez' picture, but with different signatures and different countries of issue. Aguiluz then placed Gonzalez under arrest for falsifying official documents. (Tr. 86-89).

After Gonzalez had been arrested, Aguiluz told Novoa and Daly that the arrest might not be valid. Daly then gave Aguiluz "a wink" and said, "Carl, I think they have a gun in the car also." Aguiluz then observed Novoa holding a gun which Novoa stated that he had found in the middle part of the front seat of the suspects' car. The four suspects were placed under arrest and the three detectives brought them to the Sixth Precinct stationhouse where they proceeded to the Detective Squad Room for processing and booking.

Personal property was removed from the suspects by the detectives and placed on the top of a desk near a detention cell. The three male suspects were then placed in that cell; Ms. Risso, who claimed that she was pregnant, was permitted to sit on a chair just outside the cell. (Tr. 89-94).

While the prisoners were being processed, Gonzalez called Aguiluz over to the cell and accused him of having stolen $100 from him. When Aguiluz requested that Gonzalez show him the papers in which the stolen money had been located, Gonzalez left the cell and walked to the desk on which the belongings of all the prisoners had been placed. As he was leafing through the three passports, Gonzalez pushed Aguiluz and Novoa aside, hurriedly stuffed a piece of paper in his mouth and began

eating the paper. Novoa and Aguiluz grabbed Gonzalez and attempted to extract the paper from his mouth. Daly came over to assist and proceeded to kick Gonzalez in the throat in an attempt to remove the paper. In the midst of this commotion, Ms. Risso, who had not been placed in the cell, went to the desk and began to tear up the papers lying on it. (Tr. 94-97).

After order had been restored, Aguiluz overheard Gonzalez tell the other suspects in Spanish that: "The cargo is safe. We will not suffer any loss." (Tr. 97).

C. The seizure of 105 kilograms of narcotics and the theft of five kilograms by Daly, Novoa and Aguiluz.

Although Gonzalez had swallowed the piece of paper, Aguiluz and Novoa, after examining the remaining papers and documents, determined by a process of elimination that the paper Gonzalez had swallowed, which they had previously examined several times, was a rent receipt which contained the address: 210 W. 19th Street, Apartment 4-F. While Novoa remained in the squad room with the prisoners, Aguiluz and Daly proceeded to that building, arriving in the early morning hours of April 15. (Tr. 98-101).

Using a set of keys found among Ms. Risso's belongings, they obtained access to Apartment 4-F. A search revealed some empty suitcases, various passports from South American countries and two heavily locked closets. The detectives were unable to open the closets. (Tr. 101-03).

Aguiluz then telephoned Novoa and informed him of the locked closet doors. It was agreed that Novoa would contact Detective John Kid, an expert in picking locks,

to assist in opening the closets. Detective Kid arrived at the apartment about an hour later. He opened the first of the closets with relative ease and found a closed suitcase. Daly and Aguiluz opened the suitcase and found a scale, some narcotics paraphernalia, some Christmas wrapping paper and a residue of white powder which they believed to be narcotics.

When Kid finally opened the second closet it was found to contain brick-shaped packages from floor to ceiling. Daly and Aguiluz began to remove packages from the closet and to open them. They were found to contain plastic bags full of white powder. A field test of one package indicated that it contained heroin of high purity.*

While the packages were being removed from the closet and counted, Aguiluz placed a telephone call to Novoa and informed him of the incredible quantity of narcotics that had been found. Novoa agreed to come to the apartment. Daly and Aguiluz then returned to removing and counting the packages. (Tr. 103a-15, 556-65).

While on their hands and knees in the living room of the apartment, outside of Kid's presence and hearing, Daly told Aguiluz that he wanted to keep five kilograms of the narcotics for "flaking" purposes, *i.e.*, to plant on a person so as to create grounds for his arrest. Aguiluz

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* Approximately 160 kilos of suspected narcotics were removed by the police from the apartment and vouchered with the Property Clerk's Office of the Police Department. The total seizure, including the 5 kilos retained by Novoa, Daly and Aguiluz, amounted to 105 kilograms of narcotics. Nevertheless, the seizure became known as the "100 kilo" case. The original laboratory analysis revealed the drugs to be heroin and cocaine. (Tr. 612-19; GX 5, 14) ("GX" refers to Government Exhibits in evidence).

said it was all right with him. Daly and Aguiluz then placed three kilos of heroin and two kilos of cocaine in a small brown suitcase which they found in the apartment and Daly began to carry the suitcase downstairs. (Tr. 116-20).

On his way out of the apartment, Daly ran into John Sheridan, the superintendent of the building. Sheridan observed that Daly was carrying a "little box", "[a] small box, like a toolbox." Daly told Sheridan that they had found "dope" in Apartment 4-F. Sheridan asked Daly how he had gotten into the apartment, and Daly replied that they had arrested Risso and obtained her keys. Daly then left the building and placed the narcotics in the trunk of his car. (Tr. 582-89, 602).*

At about this time, Novoa arrived at the apartment. He was informed that five kilograms of narcotics had been secreted in Daly's car. (Tr. 120-21).

Daly, Aguiluz and Novoa next decided that they wanted to "tighten" the arrests of Gonzalez, Mulas, Arraya and Risso. The detectives were concerned that their search of the apartment and seizure of the narcotics without a warrant might be found illegal. It was determined that Aguiluz would try to obtain a warrant after the fact. Aguiluz placed a call to the Manhattan District Attorney's office, informed a detective of the

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* In his opening statement, defense counsel told the jury that Aguiluz was the only witness who would testify to Daly's leaving the apartment after the massive cache of narcotics had been found. (Tr. 69). In fact, in addition to Sheridan's corroboration of Aguiluz on this point, Gabriel Stefania, Daly's supervising officer at the SIU, testified that after he (Stefania) arrived at the apartment on the morning of April 15, Daly was "entering and leaving the apartment from time to time." (Tr. 628-29).

events that had transpired from the time of the initial surveillance up to a point just prior to the entry into the apartment, and requested a search warrant. Aguiluz then left the apartment at about 8:50 a.m. to appear before a judge and obtained a warrant. At about 11:00 a.m., he returned to the apartment. Present, in addition to Daly, Novoa and Kid, were Sergeant Gabriel Stefania and Lieutenant John Egan of SIU. The men were awaiting the arrival of their superior officers and the press. The narcotics remaining in the apartment were placed in suitcases in a trunk. The press ultimately arrived, photographs were taken and some of the officers made statements. (Tr. 121-27, 130-34; GX 4).

Later that day, the narcotics were removed from the apartment to the Sixth Precinct where the processing of the prisoners continued. The narcotics were also processed. During the afternoon, Novoa told Aguiluz that Stefania had insisted that $1,200 in cash which had been seized from the prisoners be split among the four officers. Novoa was angry; he felt the cash should be divided among himself, Daly and Aguiluz only. Daly, Novoa, Aguiluz, Stefania and Egan then met concerning the matter. Novoa ultimately divided the cash, with Daly and the others each receiving a one-fifth share. (Tr. 134-40; GX 5).

D. The sales of the five kilograms of narcotics by Daly, Novoa and Aguiluz.

Approximately one week after their theft of the five kilos, Aguiluz met with Daly and Novoa and said that he wanted to take custody of the valise containing those narcotics. Daly, in Novoa's presence, took the valise from the trunk of his car and handed it to Aguiluz who, in turn, placed it in the trunk of his own car where it remained for about a month. (Tr. 142-45).

At that point, Daly, Novoa and Aguiluz decided that something had to be done with the narcotics and a meeting was set for the Club Espana at 244 West 14th Street. Novoa asked Aguiluz what he proposed to do with the narcotics; Aguiluz said he did not want to carry them around any longer; and Novoa suggested dumping them in the river. Daly told Nova to calm down and think it over—that there might be an opportunity to use the drugs for monetary gain. The three detectives then agreed that the narcotics should be sold through a "conduit" in order to "cushion" the detectives from the sale. Aguiluz suggested that his brother-in-law, Salvador Boutureira, be used as an intermediary. Daly and Novoa, both of whom had previously known Boutureira, agreed. (Tr. 146-51).

Aguiluz then met with Boutureira at the Club Espana and informed him that Daly, Novoa and Aguiluz had five kilos of narcotics which they wanted Boutureira to sell. Boutureira agreed. Aguiluz then brought the five kilos to Boutureira's apartment in Greenwhich Village, where the two men examined the five kilos and ascertained that they consisted of three kilos of heroin and two of cocaine. A price of about $12,000 per kilogram was discussed. (Tr. 151-56, 469-71).*

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* On May 11, 1970, shortly after the theft of the five kilos of narcotics and the conveyance of such narcotics to Boutureira for ultimate sale, Daly arrested some suspects at an airport on narcotics charges. Daly returned with the suspects to meet Novoa and Aguiluz at the Holiday Inn Motel on West 57th Street in Manhattan where the suspects had been staying. Aguiluz had previously called Boutureira and directed him to bring one of the five kilos to the motel in case Aguiluz "might need it". Daly told Aguiluz that in order to facilitate the arrests and to "justify" the confiscation of approximately $122,000 from the suspects, he had "flaked" them at the airport with a bag of narcotics. Aguiluz then informed Daly that it had been arranged for Boutureira to bring a kilo to the motel for that same purpose. After Boutureira brought the kilo to the motel, Aguiluz told him to go home, that he was not needed. (Tr. 204-10, 326-27, 476-78).

Boutureira subsequently met with Frank Ramos, part owner of the Cafe Madrid located at 14th Street near Seventh Avenue, and asked Ramos if he would arrange to sell the five kilograms for him. Ramos said that he needed some samples of the narcotics. Boutureira then reported to Aguiluz who told him to furnish the samples. Boutureira delivered five envelopes, each containing a sample of one of the five stolen kilos, to Ramos. Ramos later told Boutureira that the samples were "good", and that he would pay $6,000 for each kilo. Boutureira again reported to Aguiluz who said the price offered was insufficient and that Boutureira should get at least $12,000 per kilo for the heroin and $9,000 per kilo for the cocaine. Boutureira and Ramos then met and agreed on prices of $12,500 per kilo of heroin and $9,500 per kilo of cocaine from which Ramos would receive $500 per kilo as a commission (Tr. 374-79, 471-76).

1. The sale of two kilograms of stolen heroin to Demetrios Papadakis.

After receiving the narcotics samples from Boutureira, Ramos met with Demetrios Papadakis and showed Papadakis one of the samples which Papadakis immediately tried. The following day, Papadakis called Ramos to say that he was ready to buy. (Tr. 379-80).

Ramos then arranged a meeting with Papadakis at the Cafe Madrid for the purchase of a kilo of heroin * and so informed Boutureira who, in turn, communicated the information to Daly, Novoa and Aguiluz. Boutureira, followed by the three detectives, went to his apartment

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* Ramos testified that the first kilo of narcotics sold to Papadakis was one of cocaine, as opposed to heroin. Boutureira remembered that that sale was one of heroin. (Tr. 485-86).

and removed the narcotics packages to the Club Espana, where he hid them under some wood in the basement. Meanwhile, Papadakis, accompanied by a woman, Elissa Possas, arrived at the Cafe Madrid and informed Ramos that he did not have the full purchase price for the kilo, but rather wanted to tender a lesser amount and take the drugs on consignment. Boutureira had by this time arrived at the Cafe and secreted himself in a corner of the bar hidden by a partition. At the same time, Daly, Novoa and Papadakis had the Cafe under surveillance. When Ramos approached Boutureira with Papadakis' consignment proposal, Boutureira demanded the full price on delivery. Ramos told this to Papadakis, who said he would try to get the total amount, and another meeting was scheduled for the following day. (Tr. 380-32, 478-82).

The next day Papadakis called Ramos and said he had the full purchase price. Ramos told him to bring the money to the Cafe Madrid. Ramos then called Boutureira who decided that the kilo would be placed underneath a board in a parking lot in back of the White Castle hamburger restaurant on the south side of 14th Street near Eighth Avenue. Boutureira communicated this same information to Daly, Novoa and Aguiluz and then planted the kilo in the parking lot and went to the Cafe. (Tr. 383-84, 482-84).

Inside the Cafe, Ramos told Boutureira that Papadakis and Possas, the purchasers for the kilo, had produced the cash and Ramos displayed the $12,000 in twelve $1,000 bundles. Boutureira then told Ramos the location of the kilo; Ramos, in turn, told Papadakis and Possas. Papadakis then signalled to a man who was standing outside the Cafe Madrid. The man, who was wearing a black leather jacket, spoke briefly with Papadakis and left. (Tr. 383-84, 484).

Daly, Novoa and Aguiluz observed the man in the black leather jacket leave the Cafe. The three detectives then proceeded to the lobby of a building opposite the White Castle parking lot and waited. Within a short time, the man in the black leather jacket arrived at the parking lot on a motorcycle, located the package of heroin, examined it, left the parking lot and then joined a taxi cab that stopped for him on the street. The man then threw the package into the rear of the taxi, and the vehicles drove off north on Eighth Avenue at high speed. The three detectives gave chase but were unable to catch up with the speeding vehicles. (Tr. 161-64, 182-83).

Minutes later, Elissa Possas received a telephone call at the Cafe Madrid. After that call, she told Ramos that everything was all right, handed him the cash and departed. Ramos then gave the $12,000 to Boutureira and received his $500 commission on the transaction. Boutureira stuffed the money under his shirt and left the cafe. (Tr. 384-85, 485).

Boutureira drove to 14th Street past Seventh Avenue and met with Daly, Aguiluz and Novoa. Boutureira reported that the sale had taken place and then followed the three detectives to the Hotel Taft where Daly secured a room. Once inside, Boutureira removed the money from his shirt and placed it on the bed. The men counted the cash, and at Novoa's suggestion, divided it into four equal shares—$3,000 each for Boutureira, Aguiluz, Novoa and Daly. During the course of this splitting of the proceeds, Daly and Novoa complained to Aguiluz that because of the manner in which the kilo had been sold, the two detectives had been unable to follow the motorcycle and taxi cab in order to arrest the drivers and recover the drugs. Boutureira told the detectives that any such plan was dangerous to him because he

knew the purchasers would know they had been "set up" and could retaliate against him. It was agreed that in the future the detectives would observe the sales, but make no arrests. The four men then left the Hotel. (Tr. 183-91, 486-91, 609-10; GX 6).

Several days later, Papadakis again met with Ramos and stated that he wanted to purchase a second kilo of heroin of the same quality as the first package. Ramos then met with Boutureira and told him that the buyers of the first kilo wanted another. Boutureira, in turn, contacted Aguiluz and told him of the proposed second sale and that Boutureira planned this time to place the kilo in a locker in the subway station at Fourteenth Street and Eighth Avenue.*

Aguiluz, Novca and Daly followed Boutureira to the locker and watched him put the narcotics in the locker. Daly and Novoa then kept watch on the locker, while Aguiluz followed Boutureira to the Cafe. When Boutureira arrived at the Cafe Madrid and Ramos told him that the proposed purchasers had not produced the required cash, the transaction was rearranged for the following day. (Tr. 193-94, 386-87, 491-93).

The following day, Boutureira again went to the Cafe Madrid to meet with Ramos. Papadakis and Possas were present. Ramos told Boutureira that the proposed purchasers were short $1,000, but that he would accept the responsibility for making it up after the kilo was delivered. Boutureira then gave Ramos the location of the heroin and the key to the subway locker. Ramos

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* Daly, Novoa and Aguiluz were already aware of Boutureira's proposed second sale, having heard a tape of a telephone call with respect to the sale which Boutureira had made from a telephone at the Cafe Madrid. The three detectives had previously placed an illegal wiretap on that telephone (Tr. 191-94).

transmitted the information and key to Papadakis who left the Cafe. A short time later, when Papadakis called the Cafe and spoke with Possas, Possas told Ramos that everything was all right and handed him the cash. Ramos gave the money to Boutureira who, in turn, paid Ramos his $500 commission. Boutureira then left the Cafe and sought, unsuccessfully, to locate Daly, Nova and Aguiluz. He took the money to an apartment at 509 East 5th Street and hid it beneath a bed. (Tr. 387-89, 493-95).*

2. The sale of one kilogram of stolen heroin to Joaquin Nieves.

Within a week to ten days of the second sale of heroin to Papadakis, Ramos arranged for the sale of the third kilo of heroin to Joaquin Nieves, a patron of the Cafe Madrid known to Ramos as a narcotics dealer. Ramos told Nieves that the narcotics were available on short

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* Papadakis telephoned Ramos the next day to say that something was wrong and he had to speak with him. Papadakis later met Ramos and complained that the second kilo of narcotics did not match the quality of the sample he had been shown. Ramos then contacted Boutureira and persuaded him to meet with Papadakis at the Cafe Madrid to discuss the problem. Papadakis arrived at the Cafe with an unidentified man. When Boutureira appeared, Ramos introduced him; the unidentified man was stated by Ramos to be Papadakis' boss. Papadakis and his boss demanded that their purchase be rescinded on the grounds that the narcotics had been "cut". Boutureira said that the kilo could not have been tampered with since only he had handled the package. The unidentified man then accused Papadakis of cutting the heroin. He also gave Boutureira his telephone number and said that in the future he should deal directly with him. (Tr. 389-92, 495-96).

Thereafter, Boutureira met Papadakis on numerous occasions at the Cafe Madrid. Papadakis repeatedly asked to buy narcotics directly from Boutureira, but Boutureira declined to accept the offers. (Tr. 496).

notice and that Nieves should set up the purchase. The transaction was scheduled for the following day. (Tr. 392-94).

Nieves came to the Cafe Madrid the next day with a paper bag containing the purchase money. Ramos called Boutureira to inform him of the arrangements he had made and that the buyer was present with the money. Boutureira protested the lack of advance notice and tried unsuccessfully to contact Aguiluz. Boutureira nevertheless decided to go through with the transaction. (Tr. 394-95, 497).

Upon obtaining the third kilo of heroin from the basement of the Club Espana, Boutureira placed it under the seat of his car which he parked in front of the Cafe Madrid. Boutureira entered the Madrid and ascertained from Ramos that Nieves had turned over the cash. Nieves was sitting at the bar. Boutureira then communicated the location of the kilo to Nieves who immediately went to the car, removed the kilo and placed it inside a folded newspaper under his arm. Upon learning from Nieves that the heroin had been received, Ramos handed Boutureira the $12,000 which Nieves had previously given him, together with the additional $1000 owed by Ramos as a result of the second Papadakis transaction. Ramos received his customary $500 commission from Boutureira. (Tr. 395-97, 497-99).

After going to the 509 East 5th Street apartment and consolidating the $13,900 received from Ramos with the $11,000 from the second Papadakis sale, Boutureira divided the $24,000 in narcotics proceeds into four $6000 shares. He then met with Daly, Novoa and Aguiluz in front of the Maritime Union on 13th Street between Sixth and Seventh Avenues and gave each of them an envelope containing a $6000 share; Boutureira kept the remaining share as his own. (Tr. 195-96, 499-99A, 508-09).

3. The s es of two kilograms of stolen cocaine to Lorenzo Cancio.

On or about June 22, 1970, shortly after the sale of the third kilo of heroin to Nieves, Ramos introduced Boutureira to Lorenzo Cancio, a convicted narcotics dealer then recently released from prison, who patronized the Cafe Madrid. Cancio had previously told Ramos that he was trying to "get back in the business again", but that he had no money to purchase narcotics; Ramos had tried unsuccessfully to persuade Boutureira to supply him with narcotics prior to any payment. At the meeting, Cancio offered to give Boutureira a new car and $1000 in exchange for one-half kilo of cocaine "on consignment." Boutureira agreed to furnish the half kilo and later delivered it to Ramos who, in turn, gave it to Cancio. About three days later, Cancio gave Ramos $4500 which Ramos turned over to Boutureira in payment for the half kilo. Boutureira then paid Ramos a $250 commission. (Tr. 397-99, 509-11).

Thereafter, Boutureira began to deal directly with Cancio. The two met in the Cafe Madrid and Boutureira agreed to sell Cancio another half kilo of cocaine out of the remaining stolen drugs secreted in the Club Espana basement. Boutureira in fact delivered cocaine to Cancio, but upon his return to the basement realized that he had given him a full kilo by mistake. When Boutureira again met Cancio at the Cafe, Cancio himself brought up the error. Boutureira then decided to give Cancio the last remaining half kilo of cocaine to sell. Over a period of time, Cancio returned to Boutureira a total of about $18,000—including the $4500 received from Ramos—for the two kilos of cocaine.

After dividing the $18,000 into four $4500 shares, Boutureira met with Novoa and Aguiluz and gave them

each $4500. Aguiluz was given an additional $4500 for Daly as Daly's share of the proceeds of the cocaine sales to Cancio. (Tr. 195-96, 511-16).*

E. Daly's flight from justice.

On February 12, 1974, Daly arrived at the Shannon Airport in Ireland. (Tr. 861-62). On February 14, 1974, Aguiluz was arrested on perjury charges by a member of the Drug Enforcement Administration and members of the New York City Police Department. About two weeks prior to that arrest, he had received a telephone call from either Daly or Novoa informing him that in the following two weeks there would be arrests and indictments handed down with respect to "people that were very close to us." (Tr. 213-14).

On December 22, 1974 at approximately 9 p.m., Detective Sergeant Michael Atkins and Detective Constable John Bennie of the Metropolitan Police Department visited Peter Daly at the Huyton Police Station, outside of Liverpool, England. Atkins told Daly that he was in possession of a warrant issued on behalf of American authorities in connection with drug offenses in New York. Atkins read the warrant to Daly and cautioned him that he was not required to say anything and that anything he did say could be put in writing and might be used in evidence. Daly replied that he did not want to say anything at that stage. Atkins explained that Daly would be detained at the police station overnight and taken to London the following morning. (Tr. 739-41).

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* On July 6, 1970, upon his return from a vacation, Daly and Novoa spoke with Aguiluz at SIU headquarters. Daly told Aguiluz that he had found an apartment in Brooklyn belonging to Risso, had entered that apartment with the help of a janitor, and had found $5,000. Daly told Aguiluz that he would receive one-third of that money; Daly and Novoa told Aguiluz that they had already taken their one-third shares. (Tr. 197-98).

Atkins obtained certain personal property from Daly, including a two-page handwritten document setting forth Daly's antecedent history. That document reads, in part, "Largest seizure of heroin ever made in New York City's history. 100 kilos heroin and cocaine, *220 pounds* worth" (emphasis added). (Tr. 742-44, 780, 785; GX 26).

The next morning, Detectives Atkins and Bennie went to the Huyton Police Station, took custody of Daly and proceeded to the Liverpool Railway Station where the three boarded a train for the trip to London. During the course of the train ride, Daly inquired of the British officers concerning legal representation and extradition procedures. The officers told him that legal aid was available, depending upon Daly's financial condition, upon application to a magistrate. Daly stated that he received a disability pension of $9000 and had about 15,000 pounds in a bank in Ireland. The officers testified that 15,000 pounds had an approximate value of $34,000 at the time. (Tr. 746-49, 784-88).

Daly then admitted to Atkins and Bennie certain of the facts with respect to the charges against him. Daly told the officers that he had been working with Novoa "keeping observations" in New York; that they had seen a car with Florida license plates and become suspicious; that they had followed the vehicle out of their police district; and that they had found a quantity of drugs. Atkins asked what quantity of narcotics Daly and Novoa had found. Daly replied, "105 kilograms." (Tr. 749, 788-90).

Detective Bennie asked Daly if he knew Stefania, Aguiluz, Charles Wooster and John Egan;* Daly an-

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* Detective Bennie had obtained these names from a cablegram which had been used to apply for the provisional warrant for the arrest of Daly in England. (Tr. 791).

swered that he did and that all four were members of the Narcotics Bureau of the New York City Police Department. Daly continued that he had received a letter from Novoa's wife and knew that Novoa was "doing time". Daly stated that he could only assume that Aguiluz had "turned informant" and that Aguiluz had been questioned by "the Feds" concerning the matters on which Daly was facing extradition. (Tr. 750-53, 790-92).

Atkins told Daly that he found it strange that Daly would come to England knowing that he could be arrested. Daly stated that he knew that the New York City Police Department was after him and the Mexican border would be under surveillance; that he had therefore flown to Ireland; and that his reason for coming to England was concern over the situation of a sister whom he had not seen for 18 years. Daly asked the British officers how much they knew about the charges pending against him. Detective Bennie answered by reading a resume of the indictment. Daly responded with a statement to the effect that, "[t]hey must want me pretty badly. I don't want to go back to New York; I should have stayed in Ireland." (Tr. 753-54, 792-93).*

When their train reached London, Detectives Atkins and Bennie brought Daly to the Bowes Street Police Station where Daly was formally charged. Daly was again cautioned that he did not have to say anything; Daly made no reply. Daly was then taken to the Bowes

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* Subsequent to Daly's oral statement to Bennie and Atkins, the officers prepared notes and a written "statement of witness" setting forth Daly's oral statements. That written statement was presented by the Director of Public Prosecutions to Daly's solicitor prior to his extradition hearing. Daly did not attempt to controvert the written statement at that hearing. (Tr. 761-67, 769-70, 778-81, 786, 795-99; GX 27).

Street Magistrate Court where he was presented to a magistrate and applied for bail. Detective Atkins then gave reasons for opposing the granting of bail, including the fact that the offenses charged against Daly were serious and that, because Daly had been born in Ireland, he was entitled to dual nationality and could therefore obtain Irish documents and leave England. During the course of a conversation with the magistrate, Daly told the magistrate that he (Daly) would go back to Ireland. The magistrate then remanded Daly into custody. (Tr. 758-59, 794-95).

The Defense Case

A. Daly's direct testimony.

Daly testified on direct examination that he had been a member of the SIU and worked as a partner with Novoa and Aguiluz at the time of the April 14, 1970 arrests of Gonzalez, Mulas, Arraya and Risso. He also stated that Stefania had been his supervisor. (Tr. 809-11).

Daly admitted to "remember[ing] vaguely" the facts surrounding the above arrests: he recalled that he and Aguiluz had gone to a 19th Street apartment on the morning of April 15 and that at some point Detective Kid had arrived; and he further recalled that packages, presumably containing narcotics, had been found in the apartment. (Tr. 811-12, 816).

Daly denied, however, that he suggested to Aguiluz that they take some of the packages for "flaking" purposes and that there was any agreement with Aguiluz to take any of the narcotics from the apartment. Daly also denied any recollection of having taken narcotics from the apartment and having placed them in the trunk of his car. He denied ever having taken narcotics for his

own purposes while connected with the Police Department. He denied any recollection of an agreement between Aguiluz, Novoa and himself that narcotics taken from the apartment were to be sold. Also, Daly denied any recollection of receiving any money from the sale of narcotics. Finally, Daly stated that he did not remember having met at the Hotel Taft with Novoa, Aguiluz and Aguiluz' brother-in-law and dividing the proceeds of a narcotics sale. He said that he did not know if such a meeting took place. (Tr. 816-18).

B. Daly's testimony on cross-examination.

On cross-examination, Daly admitted that his tax return for the year 1970 reflected a New York City Police Department salary of about $15,000 and that it was his practice to file accurate tax returns; he further testified that in 1970 he was married and had four children (Tr. 818-20; GX 24).

Daly stated that he may or may not have made an agreement to steal narcotics with Novoa and Aguiluz on April 15, 1970, but that he just did not remember. He admitted that he worked very closely as a team with Novoa and Aguiluz; that it was not unusual for that team to work together around the clock for many days in a row; and that he had trusted them with his life. Daly also said that, although he had no recollection of stealing narcotics with Novoa and Aguiluz, it could have happened. Daly did not deny the testimony adduced against him by the Government; he just did not remember if the events occurred. (Tr. 820-37).

When confronted with Government Exhibit 26—the two-page handwritten document which Detective Atkins had taken from Daly's person in England—Daly testified that he did not recall writing the document, but recognized

that the entire first page and the portion of the second page written in ink were in his handwriting. Daly stated that he did not know the reason that the document stated, in his handwriting, "230 pounds worth". He added that he did not recall telling the British officers that he had seized 105 kilograms of heroin and cocaine. Indeed, he denied the entirety of the statements he had made to the British officers, including the "statement of witness" with which he was confronted. (Tr. 845-50, 865-69; GX 26, 27).

Daly acknowledged that he knew then and at the time of trial there were 2.2 pounds in a kilogram and that, by simple arithmetic, 100 kilos equalled 220 pounds. In contrast, when asked to divide 230 pounds by 2.2 pounds per kilogram, Daly responded, "I can't do it. I haven't got—I am not capable at this time under the pressure I am under . . ." * (Tr. 849).

Daly testified that he remembered meeting Sheridan, the superintendent at the 19th Street apartment building, but did not recall seeing him on the morning of April 15, 1970 while Daly was leaving the apartment with narcotics in his possession, although that, too, could have happened. (Tr. 851-52).

Daly testified that he had no recollection of whether he had ever "flaked" anyone. More specifically, he stated that he did not remember whether he had flaked Gonzalez, Mulas, Arraya and Risso with a gun at the time of their arrests. (Tr. 856-60; GX 2).

On the topic of his February 12, 1974 arrival in Ireland, Daly stated that he did not recall having telephoned Novoa or Aguiluz about two weeks before to say that there were indictments coming down. Too, he testified

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* Had Daly been able to perform the calculation, he would have reached the conclusion that the metric equivalent of 230 pounds is almost 105 kilograms.

that he did not remember telling the British officers that he went to Ireland because he knew the Government was looking for him and surveilling the Mexican border.

ARGUMENT

At the outset, it is necessary to comment briefly on Daly's statement at the beginning of his brief * (at page 3) that, while the evidence in this case was "necessarily similar" to that adduced in the *Papadakis* case, *supra*—which resulted in the conviction of Novoa and Papadakis—there were sufficient "differences" in the testimony and proof in this case to provide "a new framework in which to consider and review Daly's convictions."

There were most certainly "differences" in the proof in the instant case, but Daly's brief utterly fails to acknowledge them. Daly contends that the primary witnesses against him were Aguiluz, Boutureira and Ramos** —each of whom testified at the *Papadakis* trial—and then seeks to attempt to discredit those witnesses. Although Daly concedes that "some corroboration" of these witnesses was provided by other Government witnesses —Sergeant Stefania, Detective Kid, and Sheridan (Brief at page 4)—Daly has grossly understated their respective contributions to the case against him. But more significantly, Daly has totally neglected the testimony of the British officers, Atkins and Bennie, who testified to

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* "Brief" refers to the Appellants Brief on Appeal; "App." refers to Appellant's Appendix.

** In his opening statement, defense counsel argued that Aguiluz' and Boutureira's testimony at trial would be in furtherance of their conspiracy to obtain lenient treatment with respect to their own crimes in connection with the "100 kilo" case by "passing it off" on Daly. (Tr. 70-71).

Daly's admissions of wrongdoing and flight. Also Daly chooses to ignore the corroboration supplied by Gerald Hall of the accounting department of the Hotel Taft in Manhattan who was able to place Daly at that hotel on the date of a division at the Taft of the proceeds of the sale of one of the kilos as testified to by Aguiluz and Boutureira. Finally, and perhaps most importantly, Daly has failed to discuss the documentary evidence—penned in his own hand—which itself conclusively established the theft of the five kilograms of narcotics.

Thus, Daly is correct in his claim that the case against him distinguishable from that against Papadakis and Novoa—but for incorrect and somewhat disingenuous reasons. For Daly had to overcome not only the detailed narrations of his crimes provided by Aguiluz, Boutueira and Ramos, and the clear corroboration of that testimony provided by Stefania, Kid, Sheridan and Hall, but also the overwhelming evidence of guilt supplied by his flight from justice, the testimony of the British officers as to oral admissions of guilt, and written evidence of Daly's own creation of the narcotics theft.

POINT I

The prosecution of the defendant was properly conducted.

Daly argues that the prosecutor (a) improperly bolstered the credibility of Government witnesses by linking their believability to the credibility of the Government, and (b) failed to follow the clear rulings of the trial court with reference to the admissibility of similar act evidence. These arguments, premised upon Daly's

strained interpretation of remarks made by the prosecutor in summation and based in large part on unfortunate distortions of the record, are entirely meritless.

A. There was no unfair bolstering by the Government of its witnesses.

Daly begins his argument, that the prosecutor in his summation improperly bolstered the credibility of certain Government witnesses, by impugning the motives of the prosecutor.* The motive which Daly conjures up

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* The criticized remarks are italicized in the portions of the prosecutor's summation, which follow. The remarks are set out more fully here to better place them in context:

"And then I think the most important thing to let him explain, he said this is a case about a conspiracy between Aguiluz and Boutureira to obtain leniency for their derelictions by passing this off to Daly. That is an outrageous argument. But let him explain it to you, because *if Aguiluz and Boutureira are conspirators, the government has to be a co-conspirator, because we put them on the stand. And if you believe for one minute that we made up a story, put on witnesses and conjured up the evidence just to convict this defendant, then when the Judge gets done giving you the law, you don't have to get up at all, you don't have to deliberate for two seconds, but if you believe that you just sit right there and have Madam Forelady get up and say, "We find him not guilty," because we told you in the beginning the government wants a fair trial for him and for the public, nothing more, nothing less.*

You might also consider in this regard how if a conspiracy is there, you will recall that Boutureira and Ramos were sentenced by a Judge in this court. Is he supposedly a co-conspirator also? Is he supposed to be in on this, too?

There are a few other things you should ask him to explain, ladies and gentlemen, but we will move along, because I want to review the facts. That is what is im-

[Footnote continued on following page

portant, not these accusations and not these arguments about this fellow lied and that fellow lied, because if there is one person who took the stand that had a failure of recollection, it was not Aguiluz, it was Boutureira, it was not Ramos, it was not Stefania, it was not the two constables from London; it was Peter Daly." (Tr. 897-98).

The criticized remarks in the rebuttal summation are also italicized:

"Now, I told you when I first began to speak that the government calls witnesses from the cesspool of crime that we are dealing with. I told you, and I say once again, you ladies and gentlemen assess the facts of this case, that is your job. I said before and I say again if any one of you jurors charged with the responsibility that you are charged with, *if any of you thinks for a moment that this government and this court participated with any of these people in a frame job* to convict Peter Daly, as Mr. Herwitz brought out on his summation, for some other charges in other indictments, then when the Judge is done, *sit there and acquit him.* Peter Daly is charged with narcotics transactions, and the evidence in this case overwhemingly establishes what he did.

Carl Aguiluz gave a lot of explanations. And if you look at the record, page 276, page 277, he was questioned about what he expected from the government. He told you that he wanted to fight corruption. And you have heard his statement in the record.

And as for Frank Ramos, Salvador Boutureira, they testified as to what they had done, and I don't want to reiterate all the arguments previously made to you. And if you recall the testimony, Ramos squealed on Aguiluz. Then Aguiluz came in and squealed on Boutureira. Where is this conspiracy that they are supposedly in to sink Mr. Daly? What evidence is there of it?

You notice on his summation none of the testimony was challenged, none of it, of Boutureira and Ramos. Credibility was attacked, but none of the facts. The facts were inconsistent in places, and if this was supposed to be a conspiracy to get this defendant, don't you think those facts would have been absolutely consistent if we are supposed to be convicting him, as Mr. Herwitz suggests, of other crimes, and not of the four charges before you?

[Footnote continued on following page]

and attributes to the prosecutor is that he uttered these allegedly improper remarks "because he had no other means of supporting his witnesses." (Brief at 13). This argument is totally spurious and is characteristic of the myopia which Daly exhibits when confronted with the overwhelming corroboration of his guilt. Daly chooses to ignore the evidence supplied by Sheridan; Stefania; Detectives Bennie and Atkins; and Daly himself.*

Similarly inaccurate is the defense claim that there was nothing in the record which suggested that the Government might be involved in a conspiracy to frame Daly. On the contrary, it was part of the defense strategy from the outset of the trial to argue that certain Government witnesses, claimed to be blatant perjurers, were conspiring to frame Daly in order to obtain leniency. This defense strategy—aimed at tarring the Government witnesses with the brush of perjury—left a good deal of room for the jury to consider whether the Government had become a party to this alleged conspiracy. The prosecutor's response was, in this setting, fair reply to an argument suggested by the defense.

In his opening statement, defense counsel told the jury that they would, at the trial, have the opportunity

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Now, a few more points about Aguiluz and then I will move on.

There is a lot of talk, an awful lot of talk, a lot of argument by Mr. Herwitz about Aguiluz being a hundred per cent perjurer. Two points on that. No. 1, it mischaracterizes the record. He told us what he did when he was in SIU, and nobody denies it and nobody from the government condones it. And if the government has not conveyed to you by that thought, then we sort of missed the point. . . ." (Tr. 995-97).

* Indeed, the Government submits to this Court, as it argued to the jury, that there was substantial evidence to convict Daly based on the statements Daly made in Britain alone. (Tr. 934-36).

to determine "*whether or not what this case is* or is not *all about is a true conspiracy by Aguiluz and Boutureira to obtain leniency for their derelictions by passing it off on to Detective Daly.*" (Tr. 71) (emphasis added). Thereafter, this avenue was pursued by the defense, both during the examination of witnesses and during defense summation. For example, on cross-examination of Aguiluz, counsel asked: "After you agreed to join the United States Government, as you put it, in this anti-corruption drive, did you get your brother-in-law to join with you in the project?" (Tr. 331). Clearly counsel was setting the stage for the argument he was to make in his summation.

In summation to the jury, defense counsel argued (Tr. 948-949, 950, 955, 962):

> "Even Mr. Jaffe [the Assistant United States Attorney] couldn't swallow Mr. Aguiluz' explanation of why he is telling the truth. It was explained to him, said Mr. Aguiluz, by Mr. Higgins, [Assistant United States Attorney] that they were going to engage in a fight against corruption. And Mr. Aguiluz embraced the cause. I guess you would say 'He got religion.' He wants to join the fight against corruption. That is why he is here; that is the reason he is here.
>
> Well, he swore to that in this case. If you believe that, then you believe Aguiluz and his testimony in this case.
>
> * * * * *
>
> . . . Do you believe that Mr. Aguiluz is testifying here for any reason other than to build up the record so that when he comes before whatever Judge he comes before for sentence, the United States Attorney can advise that Judge of the number of cases that Aguiluz testified in and the disposition of those cases?

I would assume that he would believe that the number of convictions are the notches on his gun would help Mr. Aguiluz——

* * * * *

I read in the papers that because of the budget situation in New York City several hundreds or thousands of police officers are being laid off to save money. These aparently do not include Mr. Aguiluz. Mr. Aguiluz, who has been a shame and a disgrace to law-enforcement in this city and this country; who has been a shame and a disgrace to the Police Department of the City of New York, is a policeman receiving—what did he say, 19,000 a year? Something like that. If I called a witness, if it was a defense witness, and it was brought out I had that defense witness on my payroll and I was giving him $19,000 a year, you wouldn't believe him. You would say, 'Those criminal lawyers; they are bribing witnesses.'

Is Aguiluz a police officer because the Police Commissioner wants him to continue to be a police officer, or did Aguiluz insist 'I am not going to help you unless I continue as a police officer and my pension rights are saved and protected.'

Aguiluz called the shots. No one would give him a gift of that. And that was a condition, obviously.

* * * * *

Boutureira got consideration on the sentence that was given to him for another reason—that is in this record—that he is telling the story he told here.

Now, did he and Aguiluz have the opportunity to make this up. As I recall, it wasn't for three

> weeks after Aguiluz was arrested that Mr. Boutureria testified before the grand jury, I think on March 7. And I think that testimony was given within days or a day after he was introduced to an Assistant District Attorney in this district—I have forgotten whether it was Mr. Guiliani—and Mr. Puccio of the Eastern District." *

Thus, had there been any doubt in the juror's minds, defense counsel's summation cemented the link between the Government and the alleged "conspiracy . . . to obtain leniency" for Aguiluz and Boutureira.

Defense counsel continued in this vein when he dealt with the personal character of the Government's witnesses. In this summation defense counsel called Aguiluz "a perjurer, an admitted perjurer, a hundred per cent perjurer . . ." (Tr. 951); described him as "a man on whose testimony Mr. Daly may be convicted and he would not tell the truth for a million dollars" (Tr. 953); argued, ". . . this trio, Aguiluz, Ramos, Boutureira, perjurers and suborners of perjury, they are the heart of the government's case." (Tr. 959). Counsel then embellished his conspiracy theory: "It is not a difficult story to concoct. All Boutureira and Ramos and Aguiluz have to say is tell the truth about some transaction where Aguiluz himself alone was involved, and merely

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* These remarks followed a denial by defense counsel at the opening of his summation that he was claiming "that Mr. Jaffe or his associates have done anything in this case that was not a hundred per cent above board..." (Tr. 943) (But see Tr. 960). However, the clear implication of defense counsel's remarks was that Aguiluz was a perjurer who was not even believed by Government counsel and that improper inducements had been given to Aguiluz by the Government to "purchase" his testimony. In short, the disclaimer of defense counsel was accompanied by numerous suggestions of Governmental misconduct.

say Novoa and Daly were there. It's easy. And for professional liars it's simple. They are not held back by any compunctions." (Tr. 963).

Of course, the arguments that these witnesses were such blatant and well-rehearsed liars carried with it the clear suggestion—whether intended or not—that what was so plain to the defense must also have been equally obvious to the Government. Confronted with a defense strategy of labeling so many of the Government's witnesses as blatant perjurers, the prosecutor can hardly be faulted for arguing that, if the jurors believed the Government was part and parcel of any alleged frameup, Daly should be promptly acquitted.*

Indeed, Daly concedes (Brief at 9) that even otherwise objectionable remarks from a prosecutor can be justified in response to remarks of defense counsel. See *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975); *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973); *United States* v. *Brawer*, 482 F.2d 117 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Benter*, 457 F.2d 1174 (2d Cir. 1972). Here, defense counsel in his opening and throughout the trial surely opened the door to the response made by the prosecutor.

In this regard, *United States* v. *Santana*, *supra*, fully disposes of Daly's argument. There, defense counsel claimed that a co-defendant, Aviles, indicted but not on trial, had "framed" Santana. The Court found the "obvious implication" of counsel's statement to be that Aviles had received "preferential treatment—and perhaps even amnesty—from the prosecution for his part in trapping

* Defense counsel argued: "...there are certain words that are used in our profession. The word 'cooperate' never means testify for the defendant. The word 'cooperate' only means testify for the government. That's the parlance; that's what it means. If you are unable to or unwilling to testify for the government, you are unwilling to 'cooperate'." (Tr. 960).

Santana." *Id.* at 370. The Assistant United States Attorney in summation there replied:

> "He [Aviles] was indicted. So if all that is a big setup, it means the United States Attorney's office is also participating in it. We are going around indicting people who we know didn't have anything to do with it, to put up a front for you, which, of course, would be unethical and illegal. We don't know about that."

The Court held:

> "While unduly rhetorical, this comment was not so unfair an answer as to call for reversal, particularly in the absence of objection." *Id.* (citation omitted.)

See also *United States* v. *Benter*, *supra*. The prosecutor's remarks here, which do not approach those made in *Santana*, (even if otherwise objectionable) were fully justified as a response to the "conspiracy . . . to obtain leniency" argument of defense counsel.

Not content to argue the improprieties of the remarks actually delivered by the prosecutor—for the quite obvious reason that the remarks as delivered were unobjectionable—Daly seeks to recast them by arguing that the prosecutor told the jury (a) that "finding the Government witnesses lied entails finding that the Government is a liar" (Brief at 10); (b) that "in order to find the Government's witnesses were liars, it was necessary to find that a United States Judge was party to those lies" (Brief at 10-11); (c) "Don't fret about these people who have been known to lie . . . I believe them, the United States Government believes them, and a Judge believes them" (Brief at 11); and (d) "[w]e believed them, so should you." (Brief at 11-12).

The record clearly establishes that these "arguments", as the defendant phrases them, were, in fact, never made to the jury. The prosecutor never, as Daly argues, per-

sonally vouched for the witnesses. Nor did he argue that the Government knew its witnesses to be truthful or that the witnesses' credibility was in any way augmented because they were testifying for the Government. On the contrary, the prosecutor cautioned the jurors that some of the Government witnesses were part of a cesspool of crime and that they alone could determine the witnesses' credibility. (Tr. 55, 995). Furthermore, the prosecutor twice advised the jury in summation that their decision should be based on their own recollection of the facts, not on what the prosecutor might say to them. (Tr. 914, 1018). In addition, the prosecutor did not, as Daly suggests, advise the jurors that, if the Government was not part of a conspiracy to frame these witnesses, the testimony of the Government witnesses should be believed. He simply argued the converse that, if the jury found that a "conspiracy . . . to obtain leniency" existed of which the Government and sentencing judges were a part, the defendant should be immediately acquitted.*

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* The cases on which Daly relies are completely inapposite. In *United States* v. *Brawer*, 482 F.2d 117, 133 (2d Cir. 1973) the prosecutor stated: "The only way you [the jury] can disbelieve that evidence [Government Exhibit 17] is if you think that I sat down this week and started writing it out." Here the prosecutor made no such affirmative statement to the jury of terms or conditions under which it *must believe* the Government's witnesses; he made only the converse statement, that if the jury found a "conspiracy" to exist, it should acquit.

Similarly, in *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir. 1972), *cert. denied*, 409 U.S. 986 (1972), also relied on by Daly, the prosecutor stated, "I believe these agents, I have no doubts in my mind." No such direct pledge of the prosecutor's or the Government's credibility was made here. Indeed, unlike *Briggs* or *Brawer*, the prosecutor here repeatedly called the jury's attention to the questionable character of the Government's witnesses and reminded the jury to decide the case on its perception and recollection of the evidence, not on his remarks. (Tr.

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The fairness of the prosecutor's summation is evidenced by the fact that no objection was taken below to the remarks now assigned as so outrageous in this Court. See *United States* v. *Cunniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 796 (1976). Indeed, defense counsel below commended the Government's summation. (Tr. 942). As the Supreme Court noted in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940), ". . . counsel for the defense cannot as a rule remain silent . . . and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper or prejudicial." See also *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). When defense counsel objects to an argument neither during nor after summation, ". . . an appellate court will reverse only if the summation was so 'extremely inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings' [citations omitted]." *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). This is plainly not such a case.

914, 995, 1018). Nonetheless, even in *Briggs*, the Court held that the eleven instances of assertedly improper remarks by the prosecutor were "on many of the points . . . legitimate argument and that, on others, the degree of departure from proper norms has been considerably exaggerated." 457 F.2d at 912. Thus, the *Briggs* court affirmed the conviction below.

Again, in *United States* v. *Puco*, 436 F.2d 761, 762 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973), the prosecutor had begun questions to a co-defendant concerning a post-arrest out-of-court statement with "Did you tell me . . . ." or "Do you recall me asking you . . ." The co-defendant agreed to certain of these "questions," but denied those involving Puco. No equivalent tactic of the prosecutor in injecting his credibility is suggested by the summation remarks challenged here.

Finally, given the overwhelming evidence of guilt and the corroboration offered to the jury, any error engendered by these passing remarks of the prosecutor was clearly harmless. *See United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2d Cir. 1966), *cert. denied*, 385 U.S. 842 (1966). *United States* v. *Bowen*, 500 F.2d 41 (6th Cir. 1974), *cert. denied*, 419 U.S. 1003 (1974); *United States* v. *Bettenhausen*, 499 F.2d 1222 (10th Cir. 1974); *United States* v. *Chrisco*, 493 F.2d 232 (8th Cir. 1974), *cert. denied*, 419 U.S. 847 (1974); *United States* v. *Trutenko*, 490 F.2d 678 (7th Cir. 1973); *United States* v. *Bivona*, 487 F.2d 443 (2d Cir. 1973), *cert. denied*, 416 U.S. 956 (1973); *Satz* v. *Mancusi*, 414 F.2d 90 (2d Cir. 1969). For there was abundant evidence presented to the jury to convict the defendant wholly apart from the testimony of Aguiluz and Boutureira. As the prosecutor argued in summation (Tr. 934-36, 1017), a substantial basis for conviction was presented in the testimony of the defendant himself, both from the stand at trial and in statements given to the British police.

B. The Government did not mislead the Court nor fail to adhere to the Court's rulings on the admissibility of evidence.

Virtually ignoring the record, Daly contends that the prosecutor intentionally and deliberately "misled and failed to follow the rulings of the Court with reference to the admissibility of evidence of other [similar] acts of the defendant". (Brief at 13). In support of this argument Daly cites this Court to but a single page of the trial transcript.* What Daly and his counsel conveniently choose to ignore are those pages of the trial

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* The only passage cited is that portion of the transcript where Judge Wyatt said, "I think I am going to be cautious and exclude the sharing of money." (Tr. 22, App. 42a).

transcript which are not reproduced in his appendix in which the trial judge specifically ruled that the Government *could* introduce the evidence about which Daly so vociferously complains.

Daly argues first that when the prosecutor spoke in his opening statement about proof to be adduced concerning the theft of large amounts of money from narcotics dealers, as well as the solicitation of bribes from the narcotics dealers involved in the "100-kilo" case to "throw" the case, the Assistant was flouting a pretrial ruling of the Court excluding this evidence. This argument is preposterous. Daly overlooks the trial judge's rulings prior to opening statements, to which he adhered during the Government's case, that he would permit the Government to prove that Daly and others had agreed to take $150,000 to "throw" the "100-kilo" arrest (Tr. 15); that he would "permit everything leading up to the seizure of the heroin at the apartment, and that includes the New Jersey arrest and the police station activities, and so forth" (Tr. 16); and that he would allow testimony concerning the discussions of Nicholas Lamattina, a detective assigned to the First Precinct, and Aguiluz, Novoa and Daly about assisting the four defendants arrested by them (Tr. 200-01), including the $5,000 in good faith money which was paid. (Tr. 17). Further, the Court had stated that, if the "seizures of money were connected to narcotics, they would be admissible". (Tr. 21). Clearly the Government's opening—to which no objection was made—was proper.

Secondly, Daly argues that the prosecutor deliberately misled Judge Wyatt by misrepresenting the Government's evidence in connection with the "airport case." In making this argument, Daly contends that there was no evidence to show Daly in possession of narcotics "and the Government knew this". (Brief at 15-17). A review of the trial transcript shows that nothing could be further form the truth.

At the close of the first day of trial the Government requested a ruling from the Court concerning the "airport case." The Government told Judge Wyatt that in addition to Aguiluz, its proposed witness, Torres (Tr. 169) * was prepared to testify that he and others were arrested by Daly for possession of cocaine; that they were "flaked" by Daly; that Daly had put cocaine into a garbage can; that their money, approximately $200,000, was taken by Daly; and that when they demanded the return of their money, Daly said, "No money; cocaine" and showed them a package. (Tr. 166-67; 169-70). The Government informed the Court that it had that testimony from three separate individuals, two of whom were prepared to testify. (Tr. 167-168). The Court indicated it would allow testimony concerning the incident, including testimony as to the purpose for which Daly was using the cocaine. (Tr. 167, 170, 174).**

The next day, prior to Aguiluz resuming his testimony, Judge Wyatt delivered a cautionary instruction to the jury dealing with similar act proof. (Tr. 205). Aguiluz then testified, as the Government had represented he would, that on May 11, 1970, he, Daly, and Novoa were in front of the Holiday Inn on 57th Street,*** with three defendants in custody when Daly told him in Novoa's presence "that in order to facilitate the arrest of these three defendants he had flaked them with a bag of narcotics at the airport, and to justify the fact that

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* Not Stefania, as Daly contends. (Brief at 16).

** The Court also commented that in its prior rulings excluding sharing of money if unrelated to possession of narcotics, the Court had in mind an incident at the Hotel Taft that did not involve police officers stealing narcotics. (Tr. 168).

*** At the same time Daly, Novoa and Aguiluz had arranged with Boutureira to bring a kilo from the stolen five kilograms, also to be used to plant on the defendants. (Tr. 201, 208-10, 326-27, 476-78). Judge Wyatt had previously ruled, "I said you could prove possession of narcotics if related in point of time...." (Tr. 167; see also Tr. 170).

he had confiscated approximately $122,000." * In light of this testimony by Aguiluz, it is totally disingenous to argue that there was no proof that Daly possessed narcotics during the airport incident.**

To be sure, when Gabriel Stefania later testified that Daly had told him that he had "*found*" the narcotics for which he arrested the airport defendants (Tr. 646-47), Judge Wyatt, after colloquy, decided to exclude the evidence and granted defense counsel's motion to strike Stefania's testimony. (Tr. 660-63). This was done, because Judge Wyatt felt that Daly's possession of drugs after simply "finding" them was not sufficiently probative of his guilt. However, this decision by the Court to strike this testimony out of an abundance of caution in no way demonstrates that the prosecutor failed to fulfill his representations to the Court concerning the nature of this testimony.***

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* Daly's claim that the Court specifically excluded the testimony about the $122,000, citing page 208 of the trial transcript, is absolutely false. First, the Government had specifically told the Court that the "airport case" involved possessing narcotics and seizing money, and the Court clearly understood the offer of proof as such. (Tr. 168). Indeed, that was the entire thrust of the offer of proof (Tr. 165-74), and the Court told the Government it would permit this. (Tr. 170). But more importantly, once the testimony was elicited (Tr. 205-06), the Court did not rule that the Assistant could not introduce evidence concerning the *taking* of the $122,000. (Brief at 16). Rather, the Court denied a motion for a mistrial and ruled that evidence of *other* money, seized with Lieutenant Egan at the same time, as well as evidence that the $122,000 was *shared*, could not be introduced. (Tr. 207-08).

** Both Aguiluz *and Boutureira* had testified that the original plan for the stolen five kilograms, suggested by Daly was to use them for "flaking purposes" and that on May 11, 1975, the day of the "Airport" case arrests, Boutureira was standing by with one kilo for that purpose. (Tr. 208, 476-78).

*** The Court also barred the Government from calling Torres as a witness. (Tr. 663). A careful reading of Judge Wyatt's remarks indicates that a substantial part of his concern was the lack of time availabie to present the evidence. (Tr. 686-87).

Lastly, Daly complains that the prosecutor's summation improperly included references to the "sell-out" of the "100-kilo" case for $150,000. (Brief at 18). To support this argument, Daly relies on the fact that the Government witness Lamattina was not permitted to testify. (Tr. 550-54). However, Daly fails to apprise this Court that evidence concerning the "sell-out" of the "100-kilo" case was specifically permitted by Judge Wyatt during the testimony of Aguiluz. (Tr. 200-204).* Aguiluz had testified that he, Daly and Nova were considering exculpating the narcotics offenders in exchange for $150,000. (Tr. 199-204). Judge Wyatt excluded Lamattina's testimony (Tr. 552) because he found that Lamattina had not participated in, and was not directly connected to, any of the narcotics transactions, but was involved only in the 'sell-out." (Tr. 552, 681-87). Since Aguiluz' testimony as to his, Daly's and Nova's agreement to the "sell-out" was relevant as part of the venture and to show intent with respect to the narcotics charges, the argument made in summation—and not objected to—was completely proper.

The record, we submit, clearly reflects that the Government carefully followed Judge Wyatt's rulings. But even if some error could be found, and even if proper objections had been taken, any error would be harmless in view of overwhelming evidence of guilt.

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* The Court had earlier indicated it would allow such testimoney. (Tr. 16, 17, 21, 197-204). In fact, the Court well recognized that such evidence was before the jury and did not strike it. (Tr. 870-72).

POINT II

The defendant was clearly competent to stand trial.

Daly argues that there were a number of indications both before and during the trial that he was incompetent to assist in his own defense and that, accordingly, the prosecutor and trial judge erred in not *sua sponte* requiring a competency examination. In constructing his argument, Daly relies heavily upon the fact that, when he testified in his own defense, he was allegedly unable to recall events relevant to his trial. He also places reliance on (1) defense counsel's statement, after Daly's testimony, that he would not have put Daly on the stand had he realized the extent of Daly's "amnesia," (Tr. 882-83), and (2) the Assistant United States Attorney's remarks at the side bar, after Daly had repeatedly volunteered information not responsive to counsel's questions, that ". . . if *he claims* he is incompetent to stand trial then we ought to have had a hearing a long time ago . . ." (Tr. 812) (emphasis added).* Daly's claim is without merit.

First, it is well settled that, "[w]here the defendant complains of nothing more than memory difficulties, there is inadequate ground for holding an accused incompetent to stand trial" and a competency hearing is not required. *United States* v. *Knohl*, 379 F.2d 427, 436 (2d Cir. 1967), *cert. denied*, 389 U.S. 973 (1967). See also *United States* v. *Sullivan*, 406 F.2d 180 (2d Cir. 1969). In short, as Daly is forced to concede (Brief at 23), amnesia

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* The Assistant United States Attorney did *not* say, as Daly suggests, that he believed or saw any reasonable basis to believe that the defendant might be incompetent. In fact, a readir · of the defendant's testimony shows that he was quite articulate, except in those instances where he thought testimony would be detrimental.

does not establish incompetency nor require a competency hearing.

Secondly, Daly's acts and statements both prior to trial and at the time of sentencing belie any suggestion of incompetency. Before his trial, Daly spoke clearly and rationally about his own medical situation. (Proceedings of May 13, 1975 at 19-21), and at sentencing Daly rendered an articulate and well organized plea for leniency. (Sentencing Minutes, at 8-10).

Thirdly, and most importantly, Daly's trial testimony demonstrated that his claims of memory deficiencies were an utter fabrication. Daly's trial testimony makes it clear that his memory failures were most severe when he was asked about incriminating matters such as: his taking narcotics in the "100-kilo" case and the sharing of money from the sale of those narcotics (Tr. 817-18, 836, 852); his planting of a gun in the "100-kilo case" (Tr. 859-60); his testifying in connection with the "100-kilo case" before the State Investigation Commission (Tr. 832, 838) and the Knapp Commission (Tr. 838); his being charged by the Police Department with misconduct in connection with the "100-kilo case" (Tr. 838); his committing perjury (Tr. 839, 842-45); and his giving of statements to the British constables. (Tr. 845, 860-61, 865). Thus, the record reflects the following testimony by Daly (Tr. 861):

> "Q. I take it, sir, that your testimony is with regard to anything testified to here in this courtroom by Aguiluz as to his acts, or Boutureira and his acts, by Stefania and his acts, you have no recollection of participating with any of those people in any of those acts, is that right? A. That is a good summation, yes."

At the same time that Daly was having difficulty remembering matters that might be harmful to his case, he had no difficulty in recalling facts concerning his family

background, police experience and other matters. His remarkably selective memory also permitted him to testify that he had "never" suggested to Aguiluz that they take narcotics from the "100-kilo case" (Tr. 816); that he had "never" taken narcotics for his own purposes while with the Police Department (Tr. 817); that he "never [illegible] anybody in the context that is there" (Tr. 856); and that he "wouldn't" plant a gun on anybody. (Tr. 860).

In the context of Daly's testimony, the prosecutor's remark concerning a competency hearing (Tr. 812) was plainly nothing more than a protest against the defendant's manner of testifying, rather than a statement that the prosecutor saw any reasonable basis in fact to question the defendant's competence. By his testimony, Daly clearly demonstrated that he was aware and in full command of his faculties at trial, and the pattern of his testimony suggests a consciously selective forgetfulness by the defendant as to past events. Accordingly, the Government submits that Judge Wyatt, who was never asked to conduct a competency hearing, acted well within his discretion in determining that there was no reasonable basis to *sua sponte* order a competency examination. See *United States* v. *Hall*, 523 F.2d 665 (2d Cir. 1975); *United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972); *United States* v. *Knohl*, *supra*.

Daly cites three other items as alleged manifestations of his own incompetence:

> 1. Defense counsel's remark at trial that, "Those are the kind of questions I am asked to ask" after asking the witness Sheridan, "Did Mr. Daly sit down with you and your wife and have tea on one of those occasions?" (Tr. 608);
>
> 2. The possession by the defendant of a written resume when he was interviewed in jail by the British constables (Tr. 743, 785); and

3. The fact that the defendant told a British magistrate at a bail hearing that if released he would return to Ireland. (Tr. 859).

As to the kind of questions which counsel was given to ask, there is no evidence that this came from Daly. In fact the question was most probably from Mr. Schofield. See p. 48 *infra*. With regard to Daly's actions in England, it is utter speculation that some form of mental aberration caused him to write the statement which he now cites as evidence of incompetence. If that were the case, all similar types of evidence—flight, false exculpatory statements and admissions of guilt—would have to be considered evidence of incompetence. Moreover, as Detective Inspector Atkins testified, the practice at least in some cases in England is for jailors to have defendants prepare such statements of their life history. (Tr. 777). Also, the details of the written statement (GX 26) evince no amnesia. To the contrary, they show a person possessed of considerable memory. Finally, there is not an iota of evidence in the record to suggest that, when Daly told the British magistrate that he would return to Ireland if released on bail, Daly was aware that a trip to Ireland would be construed by the magistrate as flight.*

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* Daly also relies upon the report of a British doctor—never made part of the record below, and therefore improperly cited to this Court—which he reproduced at pages 30a-35a of his appendix. This report is not addressed to Daly's competency and nothing contained in it remotely suggests that Daly would be unable to understand the nature of the charges against him or that he would be unable to assist in his own defense. Indeed, when the report is read as a whole, it suggests that the diagnosis of "[a]mnesia and certain organic mental defects" and "[p]ost head injury cerebrovascular insufficiency" is based on nothing more than an interview with Daly at which time Daly was given an opportunity to "perform" for the doctor as he did for the jury. Unfortunately, however, Daly was not confronted in the doctor's office with a trained cross-examiner.

[Footnote continued on following page]

POINT III

Daly received adequate and effective representation at trial.

Daly contends that he was not defended by the attorney of his choice and that Mr. Herwitz and Mr. Schofield inadequately represented him at trial, because they showed greater concern for their own professional reputations than for the interests of their client. (Brief at 26). This contention is meritless. Indeed, at the conclusion of trial Judge Wyatt praised the efforts of defense counsel by saying, ". . . after many, many years of experience both at the Bar and presiding in criminal trials, I want Mr. Daly to realize that so far as I can tell no one could have had better representation than Mr. Daly has had." (Tr. 1060).

Prior to trial, the Court became aware that Mr. Schofield had previously represented Carl Aguiluz, a Government witness. (Pre-trial Hearing, May 13, 1975 at 10-11). The Government subsequently moved to disqualify Mr. Schofield on May 27, 1975, because of a possible conflict between his representation of the defendant and his prior representation of Aguiluz. (Pre-trial Hearing, May 27, 1975, at 2). The details of Mr. Schofield's prior representation of Aguiluz were fully explored in Daly's presence, upon the record. (*Id.* at 3-18). Judge

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Had the issue of Daly's competency been properly raised below, the Government was prepared to call two witnesses who would have testified that Daly's memory about the "100-kilo" case was so good that, after his accident, he began to prepare a book, together with a ghost writer, about this incident and others. (Tr. 884-85). Moreover, there were the police department doctor's reports indicating that Daly was a malingerer (Def. Ex. E *id.*) and that, until shortly before his trial, his complaints about amnesia had been limited solely to the events surrounding his automobile accident.

Wyatt then asked the defendant if he still wanted Mr. Schofield to be his lawyer, and the defendant replied that he did. (*Id.* at 18).

Nonetheless, to afford Daly the greatest protection against a claim of breach of attorney-client privilege and tactical flexibility in the case, see *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), Mr. Schofield, with the defendant's consent, brought in Mr. Herwitz to try the case. Mr. Herwitz had "considerable familiarity with a great deal of the background of this case, having represented Lieutenant Egan [Daly's superior officer] in three trials and having cross-examined Mr. Aguiluz and others extensively." (Tr. 7). Indeed, he had secured an acquittal of Lieutenant Egan in the Eastern District of New York and partial acquittals in the two cases against Egan tried in the Southern District of New York.* As Mr. Herwitz stated in his opening, however, he and Mr. Schofield shared Daly's representation. (Tr. 63).

Daly's claim that Mr. Schofield "withdrew" from the trial (Brief at 26) is simply untrue. Mr. Schofield did advise the Court that he might want to take the stand to rebut Aguiluz' testimony that he had paid a retainer to Mr. Schofield's firm and then declined to examine any witnesses or address the jury. (Tr. 298-302). However, Mr. Schofield remained at counsel table and continued to act as counsel. (Tr. 587, 591, 756). Moreover, the decision to possibly take advantage of the chance to directly contradict Aguiluz through Mr. Schofield's testimony, even as to a minor point, was surely a tactical choice of

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* This Court is certainly aware of Mr. Herwitz's reputation as a trial lawyer and a reading of the record in this case, particularly Mr. Herwitz's summation and cross-examination of the Government's witnesses, will confirm Judge Wyatt's view that Daly received extraordinarily competent representation.

the defense.* Finally, even if it could be [illegible]ed that Mr. Schofield in fact "withdrew" as coun[illegible] fail to see how Daly suffered any prejudice sinc[illegible] continued to have the benefit of Mr. Herwitz' able representation.

Various specious attacks are also leveled at Mr. Herwitz' representation. It is argued, for example, that Mr. Herwitz "committed a . . . aggrevious [sic] injustice to Daly by disassociating himself from the client in front of the jury" when he commented, during an examination of a Government witness, that "those are the kinds of questions I am asked to ask." (Tr. 608). This remark is too cryptic to have any real meaning or any probable effect on the jury. Mr. Herwitz did not, as Daly implies, say that the question had been suggested by the defendant; the most likely interpretation of the remark would seem to be that the question had come from co-counsel Mr. Schofield, and Mr. Herwitz, as principal trial counsel, did not want the jury to believe he was delaying the trial. This was nothing more than the trial tactic of an able lawyer.

The criticism leveled at Mr. Herwitz for permitting Daly to testify is also unjustified. Mr. Herwitz discussed this decision with the defendant. (Tr. 882-83). In the face of overwhelming evidence of guilt and Daly's statement to Mr. Herwitz that he was innocent, it is hardly surprising that Mr. Herwitz believed that Daly's testimony could only benefit him. When, after the defendant's testimony, Mr. Herwitz said that defense counsel would have "perhaps" asked Judge Wyatt to appoint a

* The suggestion contained in Daly's brief (at 27) that Mr. Schofield desired to testify solely in order to redeem his own reputation is belied by the fact that, when Judge Wyatt offered to give an instruction to the jury to remove "any approbrium" from Mr. Schofield, Mr. Schofield promptly responded, "I am not worried about that . . . ." (Tr. 302).

physician to determine the defendant's competency to stand trial had counsel been aware that the defendant "was suffering from amnesia to the extent that he testified to" (Tr. 882), Mr. Herwitz explained, "I am putting this on the record not because I have any indication that we have not acted properly, but for the future record . . . ." (Tr. 883; Defense Exhibit E, *id.*). Thus, contrary to Daly's argument here (Brief at 29), that trial counsel's remarks were self-serving, it is clear that Mr. Herwitz directed himself to the record, to give Daly the fullest possibility of profiting from the tactic he had chosen in his testimony, *i.e.*, claiming amnesia. Similarly, Mr. Herwitz was serving his client's interests, and certainly not treating him as a "hostile witness," as Daly claims (Brief at 29) when Mr. Herwitz reminded the witness, "Don't volunteer." (Tr. 812).

In any event, the Government submits that Daly has failed to show that his representation at trial was "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice." *United States* v. *Badalmente*, 507 F.2d 12, 21 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), *quoting United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); see also *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974). This is particularly so when the quality of representation is measured, as it must be, not in the abstract, but with reference to the strength of the case confronting defense counsel. *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975); *United*

States ex rel. Marcelin v. *Mancusi*, 462 F.2d 36, 45 (2d Cir. 1972), *cert. denied*, 401 U.S. 917 (1973); *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970). *Cf. United States* v. *Carroll*, 510 F.2d 507, 512 (2d Cir. 1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOSEPH JAFFE being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of June, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Ira Leitel, Esq.
188 Montague Street
Brooklyn, New York 11201

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

JOSEPH JAFFE

Sworn to before me this

21st day of June, 1976

LAWRENCE FARKASH
Notary Public, New York State
No. 30-4606660
Qualified in Kings County
Comm. Expires March 30, 1977